Docket No. 89-1035

JAN 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,
Petitioner,

v.

WILLIAM L. CALDWELL,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

William T. Prince
Edward L. Oast
Samuel J. Webster*
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
* Counsel of Record

16 p

NO. 89-1035

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

William T. Prince
Edward L. Oast
Samuel J. Webster*
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1035

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, CSX Transportation, Inc., submits this Reply to address arguments first raised in Respondent's Brief in Opposition.

I. VIRGINIA CODE §8.01-265 IS NOT MODELED ON §1404(A) OF THE JUDICIAL CODE

Respondent asserts, without citation of legal authority, that §8.01-265 is modeled on 28 U.S.C.

§1404(a), the federal <u>forum non conveniens</u> transfer statute. Such an assertion has no basis.

Section 1404 provides for nationwide transfer. Had this case been brought in federal court, it most surely would have been transferred to a federal court in or around Charlotte, North Carolina. (App., p.10A).

Beyond providing for transfers of cases within Virginia, Virginia Code §8.01-265 bears no resemblance to §1404. Section 8.01-265 specifically and unconstitutionally prohibits dismissals (conditional or absolute) if the transfer location is outside the Commonwealth of Virginia. Thus, §8.01-265 is contrary to the congressional intent expressed in §1404, and respondent's attempt to equate

§8.01-265 with the federal forum non conveniens transfer statute is absurd.

II. THE "HARSH CONSEQUENCES" OF DISMISSAL ARE NOT SUPPORTED BY RESPONDENT'S CASES

Respondent asserts that "the harsh consequences of dismissal are real," as posited by the Virginia Supreme Court majority, relying upon two FELA cases. (Resp. Brief at 7-8 n.3). In both cases, Gibbs v. Illinois Central Gulf R.R., 420 N.W.2d 446 (Iowa, 1988) and Reed v. Norfolk and W. Ry. Co., 635 F.Supp. 1166 (N.D. Ill. 1986), the alleged "harsh consequence" of dismissal only became a factor when plaintiff himself ran afoul of state procedure and only after application of the tolling rule of Burnette v. New York Central R.R., 380 U.S. 424 (1965). Thus, both cases are distinguishable.

Both Gibbs and Reed applied the tolling rules of Burnette and Billings v. Chicago, Rock Island & Pacific R.R. Co., 581 F.2d 707 (8th Cir. 1978), and still found plaintiffs dilatory. In both cases, plaintiffs, after being dismissed under the doctrine of forum non conveniens, failed to avail themselves of the liberal tolling rules enunciated in Burnette and Billings, thereby hoisting themselves on their own petard! Moreover, in Reed, plaintiff ignored the court's order to file in the more convenient forum in order to take advantage of the railroad's agreement to waive its limitations defense. Thus, plaintiffs' own actions caused the "harsh consequences," not the operation of a forum non conveniens dismissal.

Respondent's reliance upon Cole v. Lee, 435 S.W.2d 283 (Tex. Civ. App.

1968), is even more misplaced. The appellate court in Cole v. Lee never reached the question of whether application of the doctrine of forum non conveniens would result in any "harsh consequences".

Thus, respondent's attempt to bolster the Virginia Supreme Court's reliance upon the "harsh consequences" of dismissal are wholly without basis and should be rejected by this Court.

III. RESPONDENT CONFUSES PERSONAL JURISDICTION AND NO INCONVENIENCE WITH THE EFFECT OF THE NON-DISMISSAL PROVISION

Respondent repeatedly argues that because the court had personal jurisdiction over petitioner and because the case was tried to a verdict, petitioner suffered no inconvenience. The issue of convenience vel non was never decided by the trial court,

although it alluded to a lack of convenience. (App., p.10A). Neither proposition relates to the issue in this case.[1/]

However, neither of these two propositions, personal jurisdiction and lack of inconvenience, relate to the constitutionality of the non-dismissal provision. Rather, petitioner's inability to avail itself of the doctrine of forum non conveniens because of the non-dismissal provision, regardless of personal jurisdiction, shows the statute's discrimination. The

---

[1/] Respondent, in arguing jurisdiction, even confuses the Question Presented. (Rep. Brief, P.i.). Respondent suggests in his Question Presented that the statute is constitutional because CSX is incorporated in Virginia and has substantial operations in Virginia. CSX admits both facts. What CSX challenges is the constitutionality of the provision prohibiting dismissals of out-of-state cases based on the doctrine of forum non conveniens. Respondents characterization of the Question Presented is wholly erroneous.

heart of respondent's argument concerning lack of inconvenience ignores the practicalities of being able to appeal venue decisions.[2] Therefore, respondent's arguments concerning personal jurisdiction and lack of inconvenience have no relation to the issues in this case.

IV. RESPONDENT'S RELIANCE UPON AMERICAN MOTORISTS INSURANCE COMPANY V. STARNES, IS MISPLACED

Respondent states that this Court's decision in American Motorists Insurance Company v. Starnes, 425 U.S. 637 (1976), is dispositive. On the one hand, respondent argues that this case has no significance beyond the boundaries of

---

[2] Respondent argues, as he did in the court below, that because this case has been fully tried, granting of the Petition of Certiorari would be inappropriate. (Resp. Brief at 2, 10). Such an argument emasculates the statutory right to appeal an adverse ruling on venue. See Va. Code §8.01-267.

Virginia and therefore should be ignored by this Court. However, the statute in Starnes had no significance beyond the boundaries of Texas, but this Court granted the petition for certiorari and heard the case.

Relying upon Starnes, respondent asserts that §8.01-265 does not discriminate against out-of-state corporations. Respondent again confuses personal jurisdiction over a non-resident defendant with convenience of the place of trial. Indeed, while CSX is incorporated in the Commonwealth of Virginia and does business in Virginia, all of its operations relevant to the instant case are located in Charlotte, North Carolina, aggravating the burden of defending the lawsuit.

Moreover, this Court in Starnes looked beyond the literal terms of the

statute to its realistic application, 425 U.S. at 645, and noted that domestic corporations enjoyed appreciably little advantage over foreign corporations in the conduct of their cases. In contrast, CSX, because of the non-dismissal provision, is placed at the appreciable disadvantage of having no compulsory process to obtain the attendance of treating physicians from Charlotte, and of bringing witnesses from Charlotte to Portsmouth for trial. In examining the reality of the situation, this Court's standard articulated in Starnes compels the conclusion that the non-dismissal provision of §8.01-265 violates the Equal Protection Clause of the Constitution.

CONCLUSION

For the reasons stated above, Respondent's Brief in Opposition fails to articulate a rational basis for the non-dismissal provision. The Petition should be granted.

Respectfully Submitted,

CSX TRANSPORTATION, INC.

BY: Samuel J. Webster
Of Counsel

William T. Prince
Edward L. Oast
Samuel J. Webster*
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
*Counsel of Record
January 30, 1990

CERTIFICATE OF SERVICE

In accordance with Rule 28.2 and 28.3, I hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari upon the Respondent, William L. Caldwell, at the office of his counsel of record, Eddie W. Wilson, WILSON & ASSOCIATES, P.C., 2200 Colonial Avenue, Suite 12-B, Post Office Box 11168, Norfolk, Virginia 23517, and Professor George Rutherglen, Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901, and upon counsel for Amicus, Norfolk Southern Corporation, Rex E. Lee, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class

postage prepaid, addressed to Respondent and Amicus as set forth above, on the ___ day of January, 1990.

I further certify that I am a member of this Court, and that all parties required to be served have been served as stated above.

RULE 28.4(c) STATEMENT

Because the constitutionality of Virginia Code §8.01-265 is drawn into question in the Petition for a Writ of Certiorari, 28 U.S.C. §2403(b) may be applicable, and three copies of this Reply to Respondent's Brief in Opposition have been served on the Attorney General of Virginia, the Honorable Mary Sue Terry.

Samuel J. Webster

Counsel for
CSX TRANSPORTATION, INC.